IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

MAE HUFFMAN, PETITIONER,

VS.

HOME OWNERS' LOAN CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, entered January 13, 1942, (R. 335-343) is reported 124 F. (2d) 684. The opinion of the District Court (R. 313-317) is reported 39 Fed. Supp. 139.

II.

Grounds on Which the Jurisdiction of this Court is Invoked.

The statement of the grounds on which the jurisdiction of this Court is invoked, meeting the require-

ments of Rule 12, Par. 1, has been made under "Statement of the Jurisdiction of this Court," Part B, of the foregoing petition for *certiorari,* which is adopted and made a part of this brief.

III.

Statement of the Case.

Petitioner has stated the case in the "Summary Statement of the Matter Involved," Part A, of the foregoing petition for *certiorari,* which is adopted and made a part of this brief.

IV.

Specification of Assigned Errors Intended to be Urged.

(1) The Circuit Court of Appeals erred in deciding that under the Missouri law plaintiff was not entitled to recover from the defendant except for negligence of the defendant in acts of actually attempted repair to the fourth tread of the stairway in question.

(2) The Circuit Court of Appeals erred in deciding the question of defendant's negligence contrary to the law of Missouri and in not holding that if the defendant undertook to repair the stairway it was liable for failure to exercise ordinary care to discover and repair the defective fourth tread from the top, even though defendant performed no repairs upon the tread.

(3) The Circuit Court of Appeals erred in deciding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court and amply sufficient evidence that defendant assumed to repair the entire stairway.

(4) The Circuit Court of Appeals erred in deciding that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and re-

pair the defective condition of the fourth tread, contrary to the finding of the District Court, and amply sufficient evidence that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care could and should have known of the defective and dangerous condition which caused plaintiff's injury.

V.

ARGUMENT.

Summary of the Argument.

Point A.

In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in acts of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them.

Point B.

In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question of defendant's negligence is not governed nor affected by any federal statute or federal policy. The rule of Erie R. R. Co. v. Tompkins applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of Erie R. R. Co. v. Tompkins is not strictly applicable.

Point C.

In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

Point D.

In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

ARGUMENT.

Point A.

In ruling that under the Missouri law plaintiff could recover from defendant in tort only on account of negligence of defendant in acts of actual attempted repair to the fourth tread of the stairway, the Circuit Court of Appeals has decided an important question of local law in a way in conflict with the applicable and controlling decisions of the Supreme Court of Missouri, to the effect that a landlord who has assumed to repair premises is under a duty to exercise ordinary care to discover and repair defective conditions and liable for injuries resulting from failure to perform said duty, regardless of whether the landlord had actual knowledge of the defects or actually attempted to remedy them.

The highest court of Missouri is the final authority upon the Missouri law. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 177; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180, 188; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 467.

The highest court of Missouri is the Supreme Court (Section 1 and the Amendment of 1890 to Article VI of the Constitution of Missouri). The Supreme Court has "general superintending control over all inferior courts," (Sec. 3 Art. VI, Constitution of Missouri), including "superintending control over the courts of appeals by mandamus, prohibition and certiorari" (Sec. 8 Amendment 1884, Art, VI, Constitution of Missouri). Section 6 of the Amendment of 1884 to Article VI of the Missouri Constitution provides that "* * * the last

previous ruling of the Supreme Court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

By the Amendment of 1890 of Article VI of the Missouri Constitution, the Supreme Court consists of seven judges with two divisions, Nos. 1 and 2, and the Court en Banc comprising both divisions (Secs. 1 to 6, inclusive, Amendment of 1890, Art. VI, Constitution of Missouri). The two divisions have concurrent jurisdiction in civil cases, and decisions of the divisions are decisions of the Court (Sec. 1 of the Amendment of 1890, Art. VI, Constitution of Missouri).

Decisions by the Court en Banc are controlling over decisions by either division. In the absence of a decision by the Court, *en banc*, the latest decision of either division of the Supreme Court is controlling authority. *State ex rel. Hopkins* v. *Daues* (en banc) 319 Mo. 733, 740, 742; 6 S. W. (2d) 893, 896, 897.

The most recent decision of the Supreme Court of Missouri upon the duty and the liability of a landlord who has undertaken to make repairs of premises, is *Lasky* v. *Rudman*, 337 Mo. 555, 560, 85 S. W. (2d) 501, 503, decided by Division No. 1. In harmony with this case, and also relied upon by us, is the earlier case of *Shaw* v. *Butterworth*, 327 Mo. 622, 628, 38 S. W. (2d) 57, 60, decided by Division No. 2 of the Missouri Supreme Court. The Circuit Court of Appeals has cited no case by the Court *en banc*, and we are aware of no Court *en banc* decisions of the Supreme Court of Missouri upon the question involved. It follows that the Lasky case is controlling authority on the law in Missouri, and that the Shaw case is persuasive in so far as it is in harmony with the Lasky case.

The Circuit Court of Appeals has attempted to distinguish the Lasky case and Shaw cases, but has relied

largely on earlier decisions of the Supreme Court, and upon decisions of Missouri Courts of Appeals. Indeed the Circuit Court of Appeals quotes with aproval from the case of *Davis* v. *Cities Service Co.*, 131 S. W. (2d) 865, decided by the St. Louis Court of Appeals in 1939, which held that a landlord who attempted repairs after leasing was not liable unless he negligently "made the premises more dangerous for use, or changed the physical condition of the premises for the worse," but failed to mention the cited case of *Bressmer* v. *Kennedy*, 154 S. W. (2d) 401, decided by the St. Louis Court of Appeals on October 24, 1941, which wholly departed from the Davis case, recognized the rule of *Lasky* v. *Rudman*, 337 Mo. 555, 85 S. W. (2d) 501, and cited with approval *Marks* v. *Nambil Realty Co.*, 245 N. Y. 256 (an opinion by Chief Judge Cardozo) as follows:

> "There is a suggestion * * * that to make the landlord liable, the negligent repairs must have aggravated the defect, so that what was dangerous before became more dangerous than ever. We cannot yield assent to this restriction of the field of duty. The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. *His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.*"

The question of defendant's negligence is ruled by the Lasky and Shaw cases. It is therefore unnecessary to consider the earlier Missouri Supreme Court cases relied upon by the Circuit Court of Appeals, or the more recent Court of Appeals case relied upon by it. The Lasky and Shaw cases supersede any conflicting prior Supreme Court cases, and are controlling over any Court of Appeals case, prior or subsequent.

The ruling as to the Missouri law, of which petitioner complains, as pointed out in her petition, is the

ruling of the Circuit Court of Appeals that "under the decisions in Missouri, a tort action can only be sustained against a defendant landlord who *actually makes* a repair and as a result of his negligence in so doing, injury results" (R. 340), and that "recovery could only be had for injuries resulting from negligent *acts*[1] of defendant, and we think that negligence must in the instant case be confined to any *act of attempted repair* of the *fourth tread*" (R. 341).

It is respectfully submitted that the Circuit Court of Appeals decided the question in conflict with the decision of the Supreme Court of Missouri in the Lasky case, wherein the Missouri Court said (337 Mo. l. c. 560, 85 S. W. (2d) l. c. 503):

> "*If defendant did attempt to repair the railing, it was her duty to exercise reasonable care to discover and repair the decayed and rotten condition of the railing so as to make it reasonably safe.* The rule in that regard is well stated in *Vollrath* v. *Stevens*, 199 Mo. App. 5, 202 S. W. 283, 286, as follows: '• • • However, *when defendant voluntarily assumed to repair the defective premises she took upon herself the burden to use ordinary care to repair the premises* so that they would last for a reasonable length of time; and in discharging this duty to repair, *if she failed to remove rotten boards, floors, supports, and other material that should have been removed to make the place reasonably safe, she was guilty of misfeasance, and not nonfeasance. Finer* v. *Nichols, supra*, 175 Mo. App. (525) loc. cit. 538, 157 S. W. 1023.'
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> "Instructions are given to guide lay jurors to the proper solution of a case. Of course the defective condition of the railing caused it to fall, but, if defendant *assumed* to repair the railing, but negligently failed to exercise ordinary care to *discover* and *repair* the defective condition, *she would be*

1. All italics in this brief are ours.

> *liable for all damages proximately resulting from such failure.* The evidence favorable to plaintiff authorized such a finding, and for that reason the jury should have been so instructed. It was therefore improper and misleading to give an instruction which was calculated to cause a lay jury to believe that, although it found that defendant assumed to repair the railing, but negligently *failed to discover and repair the alleged defect*, yet, if it further found that natural wear and tear of the railing and not the negligent repair thereof caused it to fall, plaintiff could not recover."

It is also submitted that the Circuit Court of Appeals ruled the question of Missouri law contrary to the decision of the Supreme Court of Missouri in the Shaw case, where the Missouri Court said (327 Mo. 622, 628, 38 S. W. (2d) 57, 60):

> "An exception or extension of the rule obtains, however, to the effect that a landlord, *undertaking* to make repairs upon the demised premises, is liable upon making such repairs for an injury caused by his *negligence* or that of his servant. *And he is liable notwithstanding the repairs were made gratuitously or without obligation.*"

It is also submitted that the Circuit Court of Appeals ruled the question of Missouri law contrary to the decision of the Supreme Court of Missouri in the Shaw case (327 Mo. 622, 628, 631, 38 S. W. (2d) 57, 52), to the effect that a landlord who has undertaken to repair demised premises, is liable in damages if he is "negligent in any way, notwithstanding" he "may not have had actual knowledge of any defect."

The Circuit Court of Appeals attempted to distinguish the Lasky case on the ground that in that case "the defendant undertook to make repair of the very instrumentality which caused the injury" (R. 339), meaning, presumably, the porch railing involved in the

Lasky case. The Lasky case is not to be so distinguished.

In the first place, it clearly appears from the opinion that defendant did not discover or even attempt to repair the decayed parts of the porch railing which caused the railing to give way and cause injury. The decayed parts were only parts of the *railing* involved in the Lasky case. So in the case at bar the fourth tread was only a part of the *stairway* which defendant undertook to repair. To use the language of the Circuit Court of Appeals, the "instrumentality" which defendant undertook to repair and which caused the injury to plaintiff in the case at bar was the *stairway*, which defendant negligently failed to make safe by failing to repair the fourth tread. In the Lasky case the instrumentality which caused the injury was the railing which defendant failed to make reasonably safe by failing to discover and repair the decayed part.

Nor would the Lasky case be distinguishable if its facts could be distinguished from the facts of the case at bar as the Circuit Court of Appeals has attempted to distinguish them. In deciding the Lasky case the Supreme Court of Missouri quoted with approval from an opinion of a Court of Appeals, and thereby itself declared the Missouri law to be that when a landlord assumed to repair "defective *premises*" the landlord assumed "the burden to use ordinary care to repair the *premises* so that they would last for a reasonable length of time," and that if "in discharging this duty to repair" the landlord "failed to remove rotten boards, floors, supports and other material that should have been removed to make *the place* reasonably safe" the landlord "was guilty of *misfeasance*, and not *nonfeasance*." (*Lasky* v. *Rudman*, 337 Mo. l. c. 560, 85 S. W. (2d) l. c. 503).

In this connection the Court has inadvertently overlooked the point that where the highest Court of the

state has thus announced a rule of law in disposing of a question presented to it, such announcement is an authoritative and controlling statement of the state law as of the date of the decision, regardless of whether the announcement was necessary to dispose of the case. *Six Companies of California* v. *Joint Highway District,* 311 U. S. 180, 187.

Defendant's liability to plaintiff is of course the same as it would have been to its tenant Sweeney had he been injured. The landlord's liability extends to the family, servants and guests of the tenant using the premises which the landlord has let to the tenant and undertaken to repair. *Shaw* v. *Butterworth,* 327 Mo. 622, 628, 38 S. W. (2d) 57, 60. Indeed, the Circuit Court of Appeals has made no attempt to rule the liability of the landlord different as between a tenant and a servant or invitee of the tenant.

It is respectfully submitted that the Circuit Court of Appeals in holding that under the Missouri law defendant could have been liable only for negligent acts in actually attempting to repair the tread, and was not liable for failure to discover and repair the tread even though defendant had undertaken to repair the entire stairs, has erroneously decided an important question of Missouri law contrary to the applicable and controlling Missouri decisions.

Point B.

In ruling the question of defendant's negligence contrary to the Missouri decisions, the Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. Since federal jurisdiction is based upon the fact that defendant is a federal corporation, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question of defendant's negligence is not governed nor affected by any federal statute or federal policy. The rule of Erie R. R. Co. v. Tompkins applies. The Missouri law "would furnish the governing principles," and have "controlling effect," even if it should be held, contrary to plaintiff's contention, that the rule of Erie R. R. Co. v. Tompkins is not strictly applicable.

All three opinions in the case of *D'Oench Duhme & Company, Inc.* v. *Federal Deposit Insurance Corp.*, No. 206, October Term, 1941, decided March 2, 1942, hereinafter referred to as the Federal Deposit Insurance Corporation case, disclosed that this Court took jurisdiction in that case to determine the precise question of whether the rule of *Erie R. R. Co.* v. *Tompkins* applies where federal jurisdiction is based upon the fact that a federal corporation is a party. The Court did not decide the question in that case because it did not find that the question was necessarily involved. It is our contention that the precise question is necessarily involved in the case at bar.

The Federal Deposit Insurance Corporation case was a suit by the corporation upon a note, and the decision of this Court involved the question of what law was to be applied in determining the validity of the defense asserted. The defense was denied in turn by the District Court of Missouri and the Circuit Court of Appeals for the Eighth Circuit. The District Court held the Illinois law was applicable. The Circuit Court of Appeals "applied 'general law' to determine that the note was an Illinois rather than a Missouri contract," and held the defense not good under the Illinois law. In this Court the defendant contended that under *Erie R. R. Co.* v. *Tompkins*, and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, the District Court, sitting in Missouri, was required to apply Missouri's conflict of law rules, and

that by such standard it was necessary to determine the question under the Missouri law.

In the opinion delivered by Mr. Justice Douglas the Court held that the validity of the defense was governed by provisions of the Act of Congress incorporating the plaintiff Federal Deposit Insurance Corporation[2]; that the validity of the defense involved "decision of a federal not a state question." The Court held that under its view of the federal question the defense was not good, and affirmed the judgments of the Circuit Court of Appeals and the District Court.

It was the opinion of Mr. Justice Frankfurter, concurred in by the Chief Justice, that while the Court had reached the correct result, the validity of the defense in the case was not a federal question but one to be determined by the law of either Missouri or Illinois; that the defense was not good under the law of either state.

It was the opinion of Mr. Justice Jackson that the question was one of federal law, both by reason of the provisions of the Federal Deposit Insurance Corporation Act relied upon by the Court in the opinion delivered by Mr. Justice Douglas, and by reason of another provision in the Act, to the effect that "all suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States * * *." (12 U. S. C., Sec. 264(j)). It was the opinion of Mr. Justice Jackson that the latter provision was more than a jurisdictional provision in view of the provision immediately preceding it, which gave the corporation power "to sue and be sued, complain and defend, in any court of law or equity, State

2. Provisions of the Federal Reserve Act, 12 U. S. C., Sections 264(s) and (y) evidencing a "federal policy" to "protect" the Federal Deposit Insurance Corporation from "misrepresentations as to the genuineness or integrity of securities in the portfolios of banks * * *." (Opinion of Mr. Justice Douglas. *D'Oench, Duhme & Co., Inc.*, v. *Federal Deposit Insurance Corporation*, No. 206, pages 3 and 5.)

or Federal," which Mr. Justice Jackson said was sufficient for the purpose of jurisdiction.

The Home Owners' Loan Act contains no provision in respect to the liability of the corporation for negligence, under the circumstances mentioned in the case at bar or any other circumstances, except that Home Owners' Loan Corporation should "have authority to sue and be sued in any court of competent jurisdiction, Federal or State * * *." (12 U. S. C., Sec. 1463(a)). This provision was neither a specific limitation of liability for negligence nor a general declaration that the liability of the Home Owners' Loan Corporation was a federal question or a matter of federal policy. On the contrary, it indicated an intent of Congress that the Home Owners' Loan Corporation should be subject to suit either in contract or in tort, to the same extent as any private person or corporation, and in any court of competent jurisdiction, Federal or State. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 396.

Incidentally the provision of the Home Owners' Loan Corporation Act giving the corporation authority to sue and be sued in "any court of competent jurisdiction, Federal or State" did not even confer federal jurisdiction. On the contrary it left the question of "court of competent jurisdiction, Federal or State" to the general federal statutes. It was by virtue of the general federal statutes, (28 U. S. C., Sec. 41(1) and Sec. 42) that the District Court had jurisdiction of the case as an action against a federal corporation wholly owned by the government of the United States (12 U. S. C., Sec. 1463(b)).

It is respectfully submitted therefore that the question of defendant's negligence in the case at bar was not a federal question either under the opinion of the Court delivered by Mr. Justice Douglas, or under the opinion of Mr. Justice Jackson, in *D'Oench Duhme & Company,*

Inc. v. *Federal Deposit Insurance Corp.* It is further submitted that since, as pointed out in Point A, *supra,* the Circuit Court of Appeals in reversing the District Court has ruled contrary to the Missouri law, the question of whether the Missouri law is controlling or to be applied is necessarily involved.

It is respectfully submitted that the rule of *Erie R. R. Co.* v. *Tompkins* is fully and strictly applicable. Inasmuch as the question of negligence is not governed nor affected by any federal statute or federal policy, the mere circumstance that federal jurisdiction was acquired by virtue of the fact that the defendant was a federal corporation rather than on the ground of diversity of citizenship, should afford no reason for not applying the rule of *Erie R. R. Co.* v. *Tompkins.* When Congress authorized the Home Owners' Loan Corporation to sue and be sued in any court of competent jurisdiction, it manifestly intended to put the corporation on the same basis toward the citizens of the various states as any private corporation or individual engaged in a similar business, including the business of owning property and renting it for hire. Such is the reasoning and effect of the decision of this Court in *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381, 396, wherein this Court reached the conclusion that a similar authority to the federal corporation there involved included authority to be sued for tort as well as for breach of contract.

The question of negligence being governed by no federal statute or federal policy, the same reason for uniformity in the application of the common law within the states applies to the case at bar as applies to a case where jurisdiction is based upon diversity of citizenship. It is submitted therefore that the rule of *Erie R. R. Co.* v. *Tompkins,* and the diversity of citizenship cases which have followed it, is strictly applicable in the case at bar,

and in any other case as to any question of substantive law not controlled by federal statute or federal policy. It is respectfully submitted that the case at bar and similar cases are governed, to the same extent as diversity of citizenship cases, by the Rules of Decision Act (28 U. S. C., Sec. 725), which provides "the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Finally, if, contrary to our contention, it should be held that the rule of *Erie R. R. Co.* v. *Tompkins* is not strictly applicable, it is respectfully submitted that the Missouri law should be held to "furnish the governing principles" and have "controlling effect," in determining the question of defendant's negligence in the case at bar, under the rule which has existed independently of the rule of the Erie R. R. Co. case, in cases having some federal aspects, but where the particular question involved was not governed or affected by any federal statute or federal policy. *Royal Indemnity Co.* v. *U. S.*, 313 U. S. 289, 296; *Just* v. *Chambers*, 312 U. S. 383, 387; *Board of Commissioners* v. *U. S.*, 308 U. S. 343, 352; *U. S.* v. *Guaranty Trust Co.*, 293 U. S. 340; *Brown* v. *U. S.*, 263 U. S. 78, 86; *Seaboard Air Line Ry. Co.* v. *U. S.*, 261 U. S. 299, 306; *O'Sullivan* v. *Felix*, 233 U. S. 318; *McClaine* v. *Rankin*, 197 U. S. 154, and cases cited.

In the Board of Commissioners case the Court said (308 U. S. 352):

> "In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. * * *."

It is respectfully submitted that "in the absence of explicit legislative policy" exempting the Home Owners' Loan Corporation from the duty imposed upon private landlords engaged in a similar business by the law of Missouri, it is proper to "draw upon a general principle" that persons injured by acts or omissions of the Home Owners' Loan Corporation, which would constitute negligence under the Missouri law on the part of a private person or corporation owning property and renting it for hire in Missouri, are entitled to recover against the Home Owners' Loan Corporation under the same Missouri law.

The record and opinion of the Circuit Court of Appeals unmistakably present and necessarily involve both the question of whether the Circuit Court of Appeals has determined the issue of defendant's negligence contrary to the Missouri decisions, and the question of whether defendant's negligence is governed by the Missouri law. The result reached by the Circuit Court of Appeals is not to be justified upon any other law. The Court proceeded, in *the abstract*, upon the theory that the Missouri law governs, and in its opinion *purports* to determine the question upon the Missouri law. The Court has not undertaken to "gather" the law as to defendant's negligence from any source other than Missouri law. Indeed, the opinion of the Circuit Court of Appeals does not even purport to represent the personal opinions of the writer of the opinion and the concurring judges. If, therefore, as we contend, the Circuit Court of Appeals has determined the question of defendant's negligence contrary to the Missouri decisions, the result reached is supported only by an erroneous construction of the Missouri law.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reviewed, and re-

versed, for failure of the Circuit Court of Appeals to follow the Missouri law in determining the question of defendant's negligence.

Point C.

In holding that the evidence conclusively established that defendant assumed to repair only the bottom landing of the stairway, contrary to the findings of the District Court, and the evidence, that defendant assumed to repair the entire stairway, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

The ruling of the Circuit Court of Appeals, the District Court's findings, and a summary of the evidence supporting the District Court, are set out, with full references to the record, at pages 8, 9, 10 of our Petition.

Prior to the adoption of the Federal Rules of Civil Procedure, effective September 16, 1938 (Rule 86), it was the settled rule of this Court that the findings of fact of a District Court in an action at law tried to the Court without a jury, supported by substantial evidence, were conclusive on the Circuit Court of Appeals, on a review of the judgment of the District Court. *McCaughn* v. *Real Estate Land Title & Trust Co.*, 297 U. S. 606, 608, and cases cited. In the McCaughn case the Court said:

"* * * The instant case is controlled by the established rules relating to appellate review in actions at law where a jury trial has been waived. R. S. 649, 700; 28 U. S. C. 773, 875. Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The appellate court cannot pass upon the weight of evidence. *Norris* v. *Jackson*, 9 Wall. 125, 128; *British Queen Mining Co.* v. *Baker Silver Mining Co.* 139 U. S. 222; *Lehnen* v. *Dickson*, 148 U. S. 71, 73; *St. Louis* v. *Western Union Telegraph Co.*, 166 U. S. 388; *Law* v. *United States*, 266 U. S. 494; *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349, 356, 357; *Harvey Company* v. *Malley*, 288 U. S. 415, 418, 419; *Eastman Kodak Co.* v. *Gray*, 292 U. S. 332, 336, 337.

"Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be substantial. The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive. The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings.

"The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed."

It is respectfully submitted that the Federal Rules of Civil Procedure do not authorize a Circuit Court of Appeals to *disregard* and *set aside* findings of fact of a District Court in a case tried to the Court without a jury, where the findings are supported by substantial evidence; and, the Circuit Court of Appeals in the case at bar, in holding that the defendant did not undertake to repair the basement stairway, but merely the lower landing, we respectfully submit, "has so far de-

parted from the accepted and usual course of judicial proceedings, * * * as to call for an exercise of this Court's power of supervision," and present a case for review by certiorari under Rule 38, Par. (b).

It is submitted that the ruling of the Circuit Court of Appeals violates the Federal Rules of Civil Procedure. The Rules were adopted by this Court under the authority delegated by the Congress, Act of June 19, 1934, c.651, Secs. 1 and 2, 48 Stat. 1064 (28 U. S. Code, Sec. 723b and 723c). Rule 52(a) provides: "In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *." The District Court in the case at bar complied with these provisions (R. 307-310). Rule 52(a) further provides: "Findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It is manifest, we submit, that these provisions of Rule 52 do not authorize the Circuit Court of Appeals to disregard and in effect set aside findings of fact supported by substantial evidence. On the contrary, it is submitted, findings of fact supported by substantial evidence cannot be set aside as clearly erroneous, and under the Rule are conclusive on the Circuit Court of Appeals. It is respectfully submitted that in ruling the facts contrary to the findings of the District Court, supported by substantial and indeed practically uncontradicted evidence, in the face of the provisions of Rule 52(a), the Circuit Court of Appeals has decided "an important question of federal law which has not been, but should be, settled by this Court."

Finally, the Circuit Court of Appeals in the case at bar in so ruling contrary to the findings of fact and

the evidence, and contrary to the provisions of Rule 52(a), has ruled contrary to the decisions of other Circuit Courts of Appeals upon the question of the binding effect of a finding by the District Court, supported by substantial evidence, under Rule 52(a). Without exception, the decisions of the Circuit Courts of Appeals of other circuits are to the effect that such findings are conclusive and cannot be set aside on appeal.

McCaughn v. *Real Estate Company*, 297 U. S. 606, 608.

The Josephine & Mary, (1 Cir.), 120 F. (2d) 459.

Cray, McFawn & Co. v. *Hegarty, Conroy & Co.*, (2 Cir.), 109 F. (2d) 443, affirming 27 F. Supp. 93.

Commonwealth Trust Co. of Pittsburgh v. *Reconstruction Finance Corporation*, (3 Cir.), 120 F. (2d) 254.

Smith v. *U. S.*, (3 Cir.), 121 F. (2d) 692, affirming 34 F. Supp. 947.

Buckley v. *Christmas*, (4 Cir.), 121 F. (2d) 323, certiorari denied 62 S. Ct. 180.

Chalk v. *U. S.*, (4 Cir.), 114 F. (2d) 207, certiorari denied 61 S. Ct. 449, 312 U. S. 679, 85 L. Ed.

Mississippi Valley Timber Co. v. *Mengel Co.*, (5 Cir.), 112 F. (2d) 947.

Van Auken v. *Second Nat. Bank & Trust Co., of Saginaw*, (6 Cir.), 117 F. (2d) 938, certiorari denied 61 S. Ct. 1118, 313 U. S. 593, 85 L. Ed. 1547.

Gary Theatre Co. v. *Columbia Pictures Corporation*, (7 Cir.), 120 F. (2d) 891.

Maier v. *Continental Oil Co.*, (7 Cir.), 120 F. (2d) 237, certiorari denied 62 S. Ct. 101.

Gates v. *General Casualty Co. of America*, (9 Cir.), 120 F. (2d) 925.

Maryland Casualty Co. v. *Stark*, (9 Cir.), 109 F. (2d) 212.

Mid-Continent Pipe Line Co. v. *Whiteley*, (10 Cir.), 116 F. (2d) 871.

Thatenhorst v. *U. S.*, (10 Cir.), 119 F. (2d) 567.

Consolidated Realty Corporation v. *Dunlop*, (App. D. C.), 114 F. (2d) 16, 72 App. D. C. 273.

Point D.

In ruling that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, contrary to the findings of the District Court, and the evidence, that defendant in fact negligently failed to exercise ordinary care to repair the fourth tread, although it knew or by the exercise of ordinary care should have known of the defective and dangerous condition, the Circuit Court of Appeals has violated the provisions of Rule 52(a), Federal Rules of Civil Procedure, that "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." The Circuit Court of Appeals has thereby decided an important question of federal law which has not been, but should be, settled by this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals within the meaning of Rule 38 of this Court.

The ruling of the Circuit Court of Appeals appears on page [redacted] of our Petition, the District Court's findings appear on pages 5 and 6 of our Petition, and a summary of the evidence supporting the District Court is set out with full references to the record, at pages [redacted] and [redacted] of our Petition.

We desire, however, to point out and emphasize the evidence of J. H. Young, a carpenter and housebuilder of forty-five years' experience (R. 213), who examined the fourth tread, Plaintiff's Ex. 11, and the photographs of the stairway, Plaintiff's Exs. 8 and 9 (R. 214), while on the stand. He testified: that a proper inspection would have revealed that the fourth tread was split clear through lengthwise; that the front half of the tread (which was only 3 7/8 inches wide) had an overhang of 1½ inches; that only one eight-penny nail went into the stringer, and one protruded outside the broken stringer; that the nails were not "the proper size" (R. 220); that the improper nailing and the overhang of 1½ inches made the tread "absolutely not" safe (R. 221); and further:

> "Q. State whether or not that would be a reasonably safe step. A. Absolutely not. * * * When that board becomes split, then it becomes dangerous.
>
> Q. All right. Now, Mr. Young, would the unsafe condition of that board as I have described it to you be apparent to any reasonably competent contractor who looked at it?
>
> A. Well, any contractor ought to see that that step was weak when it was split." (R. 221).

The testimony of Young was undisputed; the trial court saw the fourth tread and the photographs, and believed Young, and made its finding that the tread was unsafe, and described it in his written opinion as a "pitfall [which] was set for the unsuspecting occupants of defendant's property." (R. 316).

The trial court further said:

> "The inspector was, according to the preponderance of the evidence, grossly negligent in his inspection * * *." (R. 316).

Yet the Circuit Court of Appeals does not even mention Young's testimony, nor the finding of fact of the trial court that the defendant was negligent, but wholly disregarding them, boldly asserts "that there was no substantial evidence that defendant failed to exercise ordinary care to ascertain and repair the defective condition of the fourth tread, nor in failing to repair it." (R. 343).

The Court of Appeals decides this matter as though it were the original trier of fact, in violation of Rule 52(a).

Our argument and authorities in Point B, *supra* as to the error and grounds for review by this Court presented by the ruling of the Circuit Court of Appeals on the matter of facts there involved, are equally applicable to our present jurisdictional question for review by this Court. To save space and repetition we here adopt by reference that argument and those authorities.

CONCLUSION.

The reversal of plaintiff's judgment is based upon an erroneous construction of Missouri law, contrary to the controlling decisions of the Supreme Court of Missouri, fortified by erroneous disregard by the Circuit Court of Appeals of the findings of fact of the District Court upon substantial evidence, in violation of Rule 52(a). In effect and result, the Circuit Court of Appeals has assumed the prerogative of the Supreme Court of Missouri to change the Missouri law, and the prerogative of the District Court to find and determine the facts upon substantial evidence. Petitioner respectfully prays that the writ of certiorari be granted, that the judgment of the Circuit Court of Appeals be reversed

and the judgment of the District Court be affirmed and reinstated.

Respectfully submitted,

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